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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RAMON LUIS MAESTAS,

Defendant and Appellant.

B201375

(Los Angeles County  
Super. Ct. No. BA299551)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Carol H. Rehm, Jr., Judge. Affirmed.

Syda Kosofsky, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Sarah J.  
Farhat and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

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Ramon Luis Maestas appeals the judgment (order granting probation) entered following conviction by jury of carrying a loaded firearm that was not registered to him while actively participating in a criminal street gang. (Pen. Code, § 12031, subds. (a)(1), (a)(2)(C), (a)(2)(F).)<sup>1</sup>

We reject the claims of error advanced by Maestas on appeal and affirm the judgment.

## **FACTS AND PROCEDURAL BACKGROUND**

### *1. The prosecution's evidence.*

#### *a. The current offense.*

On March 11, 2006, at approximately 9:15 p.m., Los Angeles Police Officers John Strasner and John Cuenca were on patrol on Baxter Street responding to a report of shots fired in the area. As the officers approached Echo Park Avenue, they saw a group of seven to ten individuals drinking in the middle of Baxter Street and illuminated the individuals with the high-powered spot lamps on the patrol vehicle. The officers recognized several of the individuals in the group as admitted members of a local criminal street gang, including Maestas, Joel Arce, David Ramirez and Julio Calderon. Strasner had four prior contacts with Maestas; Cuenca had three prior contacts with Maestas. The gathering was in front of the residence of a member of the gang. Someone yelled “police” and the individuals began to run. Maestas turned and looked in the direction of the officers. He was wearing a white Eko Unlimited T-shirt.

Maestas went through a small gate in front of 1616 Baxter Street and ran southbound. As he did, Strasner and Cuenca saw Maestas remove a handgun from his waist area and toss it to the ground. Strasner immediately recovered the weapon, a loaded nine-millimeter semiautomatic, and called for backup. The handgun was not registered.

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<sup>1</sup> Subsequent unspecified statutory references are to the Penal Code.

Shortly after 9:15 p.m., Los Angeles Police Officer Jeremy Olson went to Fargo Street near Echo Park Avenue. Olson saw a male running southbound across Fargo Street and stopped him. When he did, he noticed Maestas standing in the driveway at 1616 Fargo Street. Maestas was wearing a white Eko Unlimited T-shirt.

b. *Gang evidence.*

(1) *Expert testimony.*

Los Angeles Police Officer Christopher Vasquez testified as an expert on criminal street gangs. Vasquez has had approximately 15 to 20 contacts with Maestas over the years. Maestas has been an admitted member of the local criminal street gang since Vasquez met him. Also, Vasquez has seen Maestas in the company of other known members of the gang on more than ten occasions, the last time being approximately four months ago. Vasquez noted Maestas had tattooed his entire back, arms and stomach with gang material that indicated Maestas “is definitely dedicated” to the gang. Vasquez opined Maestas was a member of the gang based on self admission, gang tattoos, residence within the gang’s territory and association with other gang members. Maestas also has a gang moniker which Vasquez has seen included in a gang graffiti “roll call” within the last three months.

Vasquez testified that carrying a gun is considered “putting in work” for the gang. The more violent a gang is perceived as being, the more other gang members and law-abiding citizens will be intimidated by the gang. Vasquez opined Maestas carried the handgun for the benefit of the gang because it increased the status of the gang and allowed the gang to assault rival gang members and to intimidate the community. Even when “hanging out” in their own territory, gang members will be armed to prevent drive-by shootings by rival gang members.

The parties stipulated to the predicate offenses, which included convictions of carjacking and burglary suffered by Julio Calderon in 2002 and 2003, respectively, and convictions of murder and three counts of attempted murder suffered by Damien Brand in 2002.

(2) *Other incidents involving Maestas.*

(a) *The March 12, 2005 incident.*

On March 12, 2005, Los Angeles Police Officer Steve Zavala was on patrol near Glendale and Silver Lake Boulevards when he heard approximately eight gunshots. Zavala drove toward the sound of the shots and saw a Chevy Suburban speeding out of a parking lot with its headlights off. As Zavala pursued the Suburban with overhead lights and siren, an object was discarded from the passenger side of the Suburban. Zavala made a note of the location. When the Suburban eventually pulled over, an expended nine-millimeter cartridge fell from the lap of the driver, Joel Arce. Four other individuals were in the vehicle including Maestas. At the location Zavala noted, officers found a nine-millimeter handgun.

(b) *The graffiti incident of July 25, 2005.*

On the afternoon of July 25, 2005, Los Angeles Police Officer Bradford Gorby saw Maestas writing gang graffiti on a bench at the north end of Echo Park while in the company of several other gang members.

2. *The defense case.*

Maestas's grandmother testified Maestas began to change his ways after he became a father in 2005. On March 11, 2006, Maestas left the house to deliver invitations to his second child's birthday party.

Olivia Vargas lives at 1616 Fargo Street. On March 11, 2006, at about 9:00 p.m., she heard the front gate and looked out the window. Vargas saw a police officer, then looked up and saw Maestas coming downhill from the steps. When Vargas looked out again, Maestas was handcuffed.

A defense investigator testified the lighting situation on Baxter Street at the time of the incident would have prevented Officers Strasner and Cuenca from recognizing the facial features of individuals in the group.

### 3. *Verdict.*

The jury found Maestas guilty of carrying a loaded firearm that was not registered to him. The jury found true an allegation that Maestas was an active participant in a criminal street gang within the meaning of section 12031, subdivision (a)(2)(C), but found not true an allegation the offense was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(A).

## **CONTENTIONS**

Maestas contends the trial court erroneously refused to bifurcate the trial of the criminal street gang allegations from the trial of the underlying offense, there was insufficient evidence to support the jury's finding Maestas was an active participant in a criminal street gang and the trial court erroneously instructed the jury on the elements of participation in a criminal street gang.

## **DISCUSSION**

### 1. *Denial of the motion to bifurcate was not an abuse of discretion.*

The trial court denied a pre-trial motion to bifurcate the criminal street gang allegations from the gun possession charge, finding gang evidence was relevant to establish motive and intent.

Maestas contends the trial court erred in denying the motion. Maestas asserts the gang evidence was of minimal relevance to prove the underlying firearm possession offense and was highly prejudicial. (*People v. Cardenas* (1982) 31 Cal.3d 897, 904-905; *People v. Albarran* (2007) 149 Cal.App.4th 214, 227-228; *People v. Perez* (1981) 114 Cal.App.3d 470, 477.) Maestas argues any connection between gang membership and the alleged possession of the gun was speculative and outweighed by the prejudice that inherently flows from admission of gang evidence. (*People v. Bojorquez* (2002) 104 Cal.App.4th 335, 342-345.)

Maestas further contends the only disputed issue at trial was the identity of the individual observed by the officers. Thus, gang evidence related to motive and intent had little probative value in that it did not distinguish Maestas from the other individuals present. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193-194.) Further, intent was not an issue as the charged offense requires only general criminal intent. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.)

Maestas claims the error was prejudicial because it permitted the prosecutor to present evidence that members of Maestas's gang committed carjacking, burglary and murder. It also permitted the People to present evidence of Maestas's presence during the discharge of a firearm on March 12, 2005, and his involvement in the gang graffiti incident in June of 2005. Also, the case was close because the People relied exclusively on eyewitness testimony of police officers based on observations made under difficult lighting conditions, Maestas presented an alibi defense, the jury requested readbacks of testimony and the deliberations lasted three full days.

Maestas concludes admission of gang evidence rendered his trial fundamentally unfair in that this evidence showed criminal predisposition and invited the jury to assume guilt based on gang membership. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [116 L.Ed.2d 385]; *People v. Albarran*, *supra*, 149 Cal.App.4th at p. 232; *People v. Bojorquez*, *supra*, 104 Cal.App.4th at pp. 342-345; *People v. Luparello* (1986) 187 Cal.App.3d 410, 426.)

We review the denial of a motion to bifurcate the trial of a gang enhancement from the trial of the associated offense for abuse of discretion. (*People v. Hernandez* (2004) 33 Cal.4th 1040 1048.) *Hernandez* held the legal basis for bifurcation of a prior conviction allegation also permits bifurcation of a gang allegation. (*Id.* at p. 1049.) However, "the criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense. So less need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation." (*Id.* at p. 1048.)

*Hernandez* noted gang evidence may be relevant to “identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime.” (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.) “To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary.” (*Id.* at pp. 1049-1050.) However, “[e]ven if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself – for example, if some of it might be excluded under Evidence Code section 352 as unduly prejudicial when no gang enhancement is charged – a court may still deny bifurcation.” (*Id.* at p. 1050.)

Noting the benefits of unitary trials, *Hernandez* explained a “trial court’s discretion to deny bifurcation of a charged gang enhancement is . . . broader than its discretion to admit gang evidence when the gang enhancement is not charged.” (*People v. Hernandez, supra*, 33 Cal.4th at p. 1050.) Bifurcation is required only where a defendant can “ ‘clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.’ [Citation.]” (*Id.* at p. 1051.)

Application of *Hernandez* to this case reveals no abuse of discretion in the denial of the motion to bifurcate. Contrary to Maestas’s assertion, much of the gang evidence would have been admissible at a trial of the substantive offense on the issues of motive and intent. (*People v. Hernandez, supra*, 33 Cal.4th at pp. 1049-1050.) This is so because the loaded firearm was possessed by Maestas while he attended a gang gathering in the middle of Baxter Street in front of the home of a gang member. When police officers went to the scene in response to a report of shots fired in the area, Maestas was seen discarding a loaded firearm. The gang expert testified possession of a loaded firearm advanced many of the objectives of the gang including the gang’s desire to intimidate the law abiding citizens of the neighborhood. The firearm also provided protection against the possibility of a drive-by shooting by a rival gang. Indeed, Vazquez’s expert testimony revealed

that Maestas actively was “putting in work” for the gang by carrying a loaded firearm in public. This evidence disposes of Maestas’s assertion there was no apparent motive for possession of the weapon because it was possessed in the territory of Maestas’ gang, only fellow gang members were present and there was no crime being committed with the weapon.

In sum, because some gang evidence would have been admitted at a separate trial of the underlying offense, any prejudice is dispelled. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1050.)

Additionally, we note that none of the predicate offenses was committed by Maestas. Moreover, the record reveals the jury was not inflamed by the gang evidence in that it found the criminal street gang enhancement under section 186.22, subdivision (b)(1) not true. It therefore appears the jury followed the cautionary instruction regarding the permissible use of gang evidence and considered the evidence only for its intended purpose.<sup>2</sup> (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

*People v. Albarran, supra*, 149 Cal.App.4th 214, the case relied upon by Maestas to demonstrate prejudice, is distinguishable. In *Albarran*, there was little evidence to suggest the charged shooting was gang related. Nonetheless, a gang expert offered “a panoply of incriminating gang evidence, which might have been tangentially relevant to the gang allegations, but had no bearing on the underlying

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<sup>2</sup> The trial court gave the jury the following limiting instruction: “You may consider evidence of gang activity only for the limited purpose of deciding whether: [¶] The defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related . . . enhancements charged. [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion. [¶] You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.”



charges.” (*Id.* at p. 227.) This included evidence concerning the Mexican Mafia and death threats to police officers. *Albarran* found this gang evidence “was extremely and uniquely inflammatory, such that the prejudice arising from the jury’s exposure to it could only have served to cloud their resolution of the issues.” (*Id.* at p. 230, fn. omitted.) *Albarran* concluded admission of this evidence rendered the case “one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered the defendant’s trial fundamentally unfair.” (*Id.* at p. 232.)

Here, as noted above, the evidence indicated a gang motive for possession of the firearm. Also, no extraneous gang evidence like that offered in *Albarran* was presented in this case.

In sum, under the circumstances presented, it is clear the trial court’s refusal to bifurcate was not an abuse of its discretion and Maestas is unable to demonstrate that joinder actually resulted in gross unfairness amounting to a denial of due process. (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.)

2. *The evidence supports the jury’s finding Maestas was an active participant in a criminal street gang.*

a. *Background.*

A violation of section 12031, subdivision (a)(1), carrying a loaded firearm in public, is a misdemeanor. Subdivision (a)(2)(C) of section 12031 elevates the offense to a felony if committed by “an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22 . . . .” *People v. Robles* (2000) 23 Cal.4th 1106, held proof that a defendant is an “ ‘active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22’ ” requires proof of all the elements of the substantive offense of active participation in a criminal street gang described in section 186.22, subdivision (a). (*People v. Robles, supra*, at p. 1115.)

A violation of section 186.22, subdivision (a) has three elements. The first is active participation in a criminal street gang, in the sense of participation that is more than nominal or passive. (*People v. Castenada* (2000) 23 Cal.4th 743, 745.) The second is knowledge the gang's members engage in or have engaged in a pattern of criminal gang activity. (§ 186.22, subd. (a).) The third is conduct that willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang. (*People v. Lamas* (2007) 42 Cal.4th 516, 523; *People v. Robles, supra*, 23 Cal.4th at p. 1115; § 186.22, subd. (a).)

*People v. Lamas, supra*, 42 Cal.4th 516, held that, in order to establish the third element of a violation of section 186.22, subdivision (a), the prosecution must prove the charged gang member willfully promoted, furthered, or assisted members of his gang “in *felonious* criminal conduct that is *distinct from* his otherwise misdemeanor conduct of carrying a loaded firearm in public . . . .” (*Id.* at p. 520.)

Maestas contends evidence of the second and third element is lacking. We address these claims in turn.

b. *Knowledge of the gang's pattern of criminal activity.*

Maestas contends the prosecution failed to prove Maestas had knowledge that members of the gang had engaged in a pattern of criminal activity. (*People v. Robles, supra*, 23 Cal.4th at p. 1115.) Maestas notes he did not admit such knowledge and there was no evidence from which the jury could conclude he had such knowledge. Maestas argues factors similar to those shown by the evidence in this case, namely, police contacts, gang tattoos and admission of gang membership, are insufficient even to hold a defendant to answer on a charge of violating section 12031, subdivision (a)(2)(C). (*People v. Robles, supra*, at pp. 1109-1110.) Maestas concludes there was no evidence from which the jury could find Maestas had knowledge of the pattern of criminal street gang activity. (Cf. *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509-1510.)

Maestas's claim fails. The jury reasonably could conclude Maestas was aware of his gang's pattern of criminal activity. As previously noted, police officers, responding to a report of gunshots, found known gang members, including Maestas, in the street. Maestas ran and discarded an unregistered firearm. Included in the group of gang members were Julio Calderon, who committed the predicate offenses of carjacking and burglary in 2002 and 2003, and Joel Arce, who discharged a firearm in public (§ 246.3) in the presence of Maestas in the March 12, 2005 incident.

Additionally, Maestas had extensive gang tattoos which the gang expert testified showed a high level of dedication to the gang, Maestas repeatedly admitted gang membership and he associated with numerous members of the gang. Although the March 12, 2005 incident was not recent, there was evidence Maestas continued to be involved in the gang's activities. This included the facts of the underlying incident, in which Maestas was providing support for the gang by carrying a loaded firearm, and Vasquez's observation of Maestas's gang moniker in gang roll call graffiti approximately three months before Vasquez's testimony at trial.

Similar evidence has been found to be sufficient to uphold a finding a defendant was aware of the gang's criminal activities and pattern of criminal conduct. (See *People v. Castenada*, *supra*, 23 Cal.4th at pp. 752-753; *People v. Garcia*, *supra*, 153 Cal.App.4th at pp. 1509-1511; *People v. Schoppe-Rico* (2006) 140 Cal.App.4th 1370, 1378, fn. 8; *In re Jose P.* (2003) 106 Cal.App.4th 458, 467-468.)

The evidence presented in this case was more extensive than the evidence presented in *Robles*. In *Robles*, the gang expert who testified at the preliminary hearing admitted there was no reason to believe the defendant knew of the incidents the prosecution relied upon to establish the required predicate offenses. Here, the evidence showed Maestas likely had such knowledge in that he was in Arce's company when Arce discharged a firearm in public, he was in Calderon's company

at the time of the current offense and the gang expert testified Maestas's name continued to appear in gang graffiti.

*c. Maestas engaged in felonious conduct.*

Maestas additionally asserts there was no evidence he engaged in, “promoted, furthered, or assisted in *felonious* conduct by members of his gang *distinct from* his otherwise misdemeanor offense of carrying a firearm . . . .” (*People v. Lamas, supra*, 42 Cal.4th at p. 521.)

However, apart from the allegation Maestas was an active participant in a criminal street gang within the meaning of section 12031, subdivision (a)(2)(C), the information alleged, and the jury found, the handgun Maestas discarded was unregistered within the meaning of section 12031, subdivision (a)(2)(F). This finding elevated the misdemeanor offense of possession of a loaded firearm in public to a felony notwithstanding the additional allegation the handgun was possessed while Maestas was an active participant in a criminal street gang. Because the jury found Maestas possessed an unregistered loaded firearm in public, *Lamas* is inapplicable.

Maestas resists this conclusion and asserts an allegation under section 12031, subdivision (a)(2)(F) does not render the offense of carrying a loaded firearm in public a felony but an alternate misdemeanor/felony, commonly referred to as a wobbler. Maestas argues a wobbler is insufficient to show a pattern of “felonious” conduct. Although Maestas concedes a wobbler stands as a felony for all purposes unless the offense is declared a misdemeanor under section 17, subdivision (b) (*People v. Banks* (1959) 53 Cal.2d 370, 387), Maestas complains the trial court had no occasion to make that determination in this case. Maestas concludes the conviction of a wobbler is insufficient to establish that he engaged in felonious conduct.

However, this argument was rejected in *Banks*. There, the defendant pleaded guilty to a wobbler and imposition of sentence was suspended. (*People v. Banks*, *supra*, 53 Cal.2d at p. 375.) After completing the probationary term, the defendant was entitled to have the prior charged offense dismissed, but failed to make the necessary request. (*Ibid.*) When the defendant was thereafter arrested for being a felon in possession of a firearm, *Banks* concluded the defendant was a “felon” even though he was entitled to have the former charge reduced to a misdemeanor or dismissed. (*Id.* at pp. 375-376.)

Thus, under *Banks*, the offense of carrying a loaded unregistered firearm in public is considered a felony for all purposes until such time as the charge is reduced to a misdemeanor or dismissed. (See *People v. Statum* (2002) 28 Cal.4th 682, 688-689.) Consequently, the jury’s finding under section 12031, subdivision (a)(2)(F), is sufficient to support the finding Maestas willfully promoted, furthered, or assisted in felonious conduct.

In sum, substantial evidence supports the jury’s finding under section 12031, subdivision (a)(2)(C).

3. *Any instructional error was harmless.*

Maestas contends the trial court’s instruction on the elements of participation in a criminal street gang was improper under *Lamas*. Maestas asserts that here, as in *Lamas*, the trial court instructed the jury the felonious criminal conduct required for a violation of section 12031, subdivision (a)(2)(C) included possession of a loaded firearm.<sup>3</sup> However, possession of a loaded firearm is a misdemeanor.

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<sup>3</sup> The trial court instructed the jury as follows: “If you find the defendant guilty of unlawfully carrying a loaded firearm, you must then decide whether the People have proved the additional allegation that the defendant was an active participant in a criminal street gang. [¶] To prove this allegation, the People must prove that, one, when the defendant carried the firearm, the defendant was an active participant in a criminal street gang; two, when the defendant participated in the gang, he knew that members of the gang engaged in or have engaged in a pattern of criminal street gang activity; and, three, the defendant willfully assisted, furthered,

Maestas concludes the error requires reversal. (*People v. Lamas, supra*, 42 Cal.3d at p. 526.)

It appears the jury was misinstructed under *Lamas*. However, *Lamas* noted instructional error that improperly describes or omits an element from the jury's consideration is subject to review under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705]. (*People v. Lamas, supra*, 42 Cal.3d at p. 526.) Here, the error was harmless because the jury found the loaded firearm Maestas carried in public also was unregistered under section 12031, subdivision 13(a)(2)(F). As noted in the previous discussion section, this finding rendered the offense a felony apart from the allegation under section 12031, subdivision (a)(2)(C).

At oral argument, Maestas expanded on this contention and noted the handgun possessed by the defendant in *Lamas* was unregistered. Nonetheless, *Lamas* found the instructional error prejudicial. Based thereon, Maestas reasons the jury's finding the firearm was unregistered under section 12031, subdivision (a)(2)(F) is insufficient to distinguish this case from *Lamas*.

The facts in *Lamas* indicate the weapon allegedly discarded by the defendant had been reported stolen. Based thereon, it might be assumed the weapon was not registered to the defendant. However, the unregistered nature of the weapon was not presented to the jury in the form of an allegation under section 12031, subdivision (a)(2)(F), as it was in this case. Thus, *Lamas* had no occasion to consider whether the special finding under section 12031, subdivision (a)(2)(F) rendered the instructional error harmless. We confidently conclude this finding distinguishes *Lamas* from the present case. Because the element missing from the instruction was decided against Maestas under other properly given instructions, the error was harmless.

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or promoted felonious criminal conduct by members of the gang. [¶] . . . [¶] . . . Felonious criminal conduct means committing the following crime: unlawfully carrying a loaded firearm.”

**DISPOSITION**

The judgment (order granting probation) is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.